IN THE
SUPREME COURT OF THE UNITED STATES

NO.

GEORGE G. KILARJIAN, ET AL

Petitioner

—against—

UNITED STATES OF AMERICA, as owner
of the USNS BLUE JACKET

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully petitions this Court to rehear his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, pursuant to subparagraph (2) of Supreme Court Rule 58, the said petition number 344 having been denied on October 12, 1970.

The original petition for a writ of certiorari was filed for the purpose of correcting the error of the lower court which untenably deprived your petitioner of the right to sue for personal injury and wrongful death as specifically provided under the Public Vessels Act and contrary to the implementing regulations in Title 32, C.F.R., Chapter VII, Secs. 842.68, 842.92 — Rule 2, Note 2, respecting Article VIII, paragraph 5(h) of the said NATO—SOFA Treaty Agreement which was relied upon by the Court below in its holding.

Petitioner earnestly believes that this Honorable Court has overlooked this sole controlling factor and authority by reason of your petitioner's injudicious inundation thereof in extensive and injudicious verbiage.

The fundamental reason for the original petition for a writ of certiorari was that the decision by the Hon. Walter R. Mansfield, United States District Judge, which was based on the holding of Hon. Marvin E. Frankel in the case of Schafter v. U.S.A. reported in 273 F. Sup. 152 (S.D.N.Y. 1967) and affirmed by the Circuit Court of Appeals on the same authority, decided a novel and vital question, heretofore undecided, which untenably modified maritime legislation and the exclusive jurisdiction of the Federal District Courts in such an unusual manner that it required review, clarification and adjudication by this Honorable Court; particularly insofar as the substantive rights of a large vital segment of maritime claimants to sue or counterclaim for personal injury and

wrongful death under the Public Vessels Act in the District Courts of the United States were abolished by virtue of the interpretation placed upon the NATO—SOFA Treaty Agreement by Hon. Justice Marvin E. Frankel.

Petitioner was denied his day in Court on the merits and his claim for personal injuries and death has been completely barred by reason of the said holding of the Court below, for which there is absolutely no precedent in Admiralty Law or maritime jurisprudence, and which is absolutely in conflict with the provisions governing such claims in the Code of Federal Regulations implementing the NATO—SOFA Treaty Agreement, as cited by your petitioner in the original petition for a writ of certiorari.

This conflict concerns the substantive maritime rights of our nationals, as well as nationals of foreign powers, and militates against the very purpose, spirit and intent of our Foreign Claims Act, Title 10, Section 2734 et seq. which Congress expressly intended to implement the speedy settlement of all meritorious claims, including maritime and admiralty claims, pursuant to the objective of maintaining the most friendly relations with foreign countries and their nationals.

The specific provisions of the Federal Regulations that definitely appear to be controlling on this present application, and which your petitioner frankly and earnestly believes have been inadvertently overlooked by this Honorable Court, by reason of your petitioner's error and not truly considered with regard to petitioner's substantive rights herein, are contained in Title 32, C.F.R., Chapter VII, Sections 842.68 and 842.92, Rule 2, Note 2, as contained in Exhibit 1 attached hereto and made a part hereof. Your petitioner's original petition for a writ neglected to recite that Chapter VII was the relevant chapter involved.

Title 32, Chapter 7, Section 842.68 entitled "COUNTERCLAIMS (NATO)" specifically provides in paragraph (a) (2), that paragraph 5 (h), Article VIII of the said NATO—SOFA Treaty Agreement excludes from its provisions all claims arising out of or in connection with the navigation or operation of a ship, or with the loading, carriage or discharge of cargo; nevertheless, the Court below erroneously held that your petitioner's counterclaim was barred by reason of the aforesaid provision of the NATO—SOFA Treaty Agreement.

The claim represented by your petitioner herein arises out of just such a situation involving a collision with a privately owned vessel, the M/V DIRK, resulting from the navigation and operation of the Public Vessel, namely the U.S.N.S. BLUE JACKET, by the respondent herein.

Section 842.90 entitled, "Subpart H, Admiralty Claims 10 U.S.C. 9801—9804 and 9806", governs the settlement, payment and compromise of all such claims and counter—claims under the NATO—SOFA Treaty Agreement. Section 842.92 thereunder defines and delineates all such claims that are payable or non—payable as they are classified by the Code of Federal Regulations under Chapter 7, wherein Rule 2 thereof, specifically governs maritime personal injury and death claims under the NATO—SOFA Treaty Agreement; and, quite clearly, Note 2, specifically states that personal injury and death claims are subject to suit under the Public Vessels Act.

Thus it plainly appears that the holding of the Courts below conflicts with the authority for suit by your petitioner under the Public Vessels Act, as specifically provided in the aforesaid federal regulations; and, your petitioner respectfully

feels that this conflict should be resolved, clarified and adjudicated upon review and brought under the supervision of this Honorable Court.

WHEREFORE, petitioner respectfully prays for a rehearing of his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, and further prays that at such rehearing this worthy Court will grant the Writ.

Respectfully submitted,

FRANCIS J. NICOSIA
Counsel for Petitioner

CERTIFICATE

The undersigned certifies that this petition is not made for the purpose of delay, that it is restricted to the purposes set forth in Supreme Court Rule 58 and it is presented in good faith.

FRANCIS J. NICOSIA
Counsel for Petitioner

§ 842.67 Processing NATO third party claims.

Rule	A If a claim arises—	B Then it will be—	C And—
1	From an act or omission of a member of a force or civilian component while performing official duty (see Note 1).	Settled or adjudicated by the receiving state under laws and regulations governing claims arising from activities of its own armed forces.	The receiving state pays any award or judgment subject to pro rata reimbursement by the sending state.
2	From any other act, omission or occurrence for which a force or civilian component is legally responsible (see Note 1).		
3	Out of a tortious unofficial act or omission by a member of a force or civilian component or the incident to the use of any military vehicle of the United States (see Note 2).	Considered by the receiving state, which submits to the sending state a report on the claim that includes recommendations on liability and amount of a fair and just award.	The sending state then determines whether to grant a award will be offered under its laws and in what amount (see Note 3).
4	Under rule 1, 2, or 3 and the U.S. vehicle or individual concerned is covered by a policy of liability insurance.	Referred to the insurer by either state.	The insurer settles and pays (see Note 4).

NOTES: 1. Except contractual claims and those to which paragraphs 6 and 7 of Article VIII apply.

2. Except when a force or civilian component is legally responsible under paragraph 6 of Article VIII (see paragraph 7).

3. If an award is made under Subpart E, G, or M of this part and accepted by the claimant in full satisfaction of the claim, payment will be made and the receiving state will be notified of the action taken.

4. If a noncombat claim is denied or not promptly paid, follow the procedure prescribed in Subpart E of this part for claims covered by insurance.

§ 842.68 Counterclaims (NATO).

(a) Under paragraph 5(a) of Article VIII, a receiving state is authorized to assert, adjudicate (litigate), or settle certain affirmative property damage claims on behalf of the United States.

(1) A foreign country may assert a claim on behalf of the United States only if it relates to a third party NATO claim arising from activities of U.S. military or civilian personnel.

(2) Paragraph 5(h), Article VIII, also excludes from this provision claims arising out of or in connection with the navigation or operation of a ship or with the loading, carriage, or discharge of a cargo (see Subpart H of this part).

(3) A receiving state may assert a counterclaim on behalf of the United States only if its laws and regulations permit a counterclaim in similar circumstances for its own armed services and do not require that the claim be assigned to it. However, the sending state office may authorize a receiving state office to take, in its own name, any legal action necessary to assert a claim and in particular, to assert the claim by set-off, counterclaim, or court action.

(b) The extent of a receiving state's obligation by treaty to present a counterclaim on behalf of the United States may depend on whether the particular counterclaim is discretionary or compulsory under its own laws governing counterclaims for its own armed forces. If a receiving state refuses to present a counterclaim on behalf of the United States in a proper case, the staff judge advocate, without further action, will report the refusal to AFJALD. Include with the report any explanation the receiving state gives for its refusal to process the counterclaim and a statement of its applicable law.

§ 842.69 International military headquarters.

(a) The Protocol, set up under the North Atlantic Treaty, defines the status of all headquarters and allied personnel stationed, assigned, or attached to SHAPE or its subordinate international military headquarters. (5 U.S.T. 870; T.I.A.S. 2978). It is now effective in all NATO countries except Canada and the Federal Republic of Germany.

(b) Claims provisions of the Protocol are included in Articles IV and VI. They provide that scope claims generated by allied personnel attached to an international headquarters are the responsibility of the international headquarters rather than the country to which the personnel belong. Claims caused by U.S. personnel assigned to these headquarters will be processed as shown in § 842.68.

Subpart H—Admiralty Claims (10 U.S.C. 9801–9804 and 9806)

§ 842.90 Scope of subpart.

This subpart tells how to settle, pay, and compromise claims for or against the United States that arise from marine accidents or incidents and are not the subject of pending litigation.

§ 842.91 Authority, waiver, and time limitation for admiralty claims.

(a) *Statutory authority*—(1) *Air Force.* 10 U.S.C. 9801–9804 and 9806 (authorizes administrative settlement, payment, and compromise of claims within its provisions; supplements 28 U.S.C. 1346, 2401, and 2402 and 46 U.S.C. 741–709 under which suits in admiralty may be brought against the United States).

(2) *Army.* 10 U.S.C. 4801–4804, and 4806.

(3) *Navy.* 10 U.S.C. 7365, 7621–7623, and 7625.

(b) *Waiver of interdepartmental claims.* The following procedure applies unless claim is payable by commercial underwriters. The interdepartmental waiver is predicated on the doctrine that property belonging to the Government is not owned by any department of the Government. The Government does not reimburse itself for the loss of its own property, with the following exceptions:

(1) Post Office Department claims.

(2) GSA vehicle damage claims.

(Maritime Administration vessels operating under a bareboat charter and Navy vessel chartered to commercial operators are covered by protection and indemnity (P&I) insurance; Government vessels operating under a general agency agreement, by $1,000 deductible P&I insurance for damage to Air Force shore structures only.) Do not make waiver determination in field; forward file to AFJALD.

(c) *Statute of limitations.* Claims against United States must be approved for settlement by Secretary of the Air Force or his designee and accepted by claimant within 2 years from date cause of action originated; thereafter no authority for administrative settlement exists. (When claims office receives notice of intention to file, it must advise the claimant or potential claimant of comprehensive application of this time limit.)

§ 842.92 Payable and nonpayable claims.

Rule	A If claim is for—	B Then it is—	
		Payable	Not payable
1	Property damage caused by a vessel of or in service of the Department of the Air Force (see Note 1).	X	
2	Personal injury or death of persons, including stevedores, not attached to the damaging Air Force vessel (see Note 2).	X	
3	Salvage rendered to vessels of or in service of the Air Force.	X	
4	Damage to or loss or destruction of property resulting from enemy action or directly or indirectly from an act of U.S. Armed Forces engaged in combat or in immediate preparation for impending combat.		X
5	Personal injury or death of U.S. Armed Forces members incurred incident to their service.		X
6	Personal injury or death of civilian employees of the United States to whom the Federal Employees' Compensation Act (5 U.S.C. 8101, et seq., formerly 5 U.S.C. 751) applies.		X
7	Damage or injury that is the subject of a suit or pending litigation to which the United States is a party.		X
8	Damage or injury cognizable under a status of forces agreement, such as NATO SOFA.		X

NOTES: 1. "Vessel" includes every description of water craft or other artificial contrivance used or capable of being used as a means of water transportation. Air Force parallels Government liability under the Suits in Admiralty Act (46 U.S.C. 741) and the Public Vessels Act (46 U.S.C. 781). Property damage has been construed to include, among other things, swell damage, damage to fish nets and lobster pots, and curb damage. 46 U.S.C. 740 extends admiralty jurisdiction to damage caused by a vessel to a land structure (such as a dock or pier).

2. These are also subject to suit under the Public Vessels Act.

[32 F.R. 14824, Oct. 26, 1967, as amended at 33 F.R. 2007, Jan. 31, 1968]

§ 842.93 Salvage claims.

(a) Salvage claims are limited to those for salvage services rendered to vessels